

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TYRONE KEYS :
Plaintiff, :
v. Case No. 8:18-cv-02098-CEH-JSS :
BERT BELL/PETE ROZELLE :
NFL PLAYER RETIREMENT PLAN :
and the NFL PLAYER DISABILITY :
& NEUROCOGNITIVE BENEFIT :
PLAN :
Defendants. :
_____ :

**PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS
COUNTS I AND III OF DEFENDANTS THE BERT BELL/PETE ROZELLE NFL
PLAYER RETIREMENT PLAN AND THE NFL PLAYER
DISABILITY & NEUROCOGNITIVE BENEFIT PLAN**

Introduction

Keys' Complaint (Doc. 1) is not a typical claim for accrued benefits under §1132(a)(1)(B) of the Employee Retirement Income Security Act (ERISA) because the final adverse benefit determination of the Retirement Board of the Bert Bell/Pete Rozelle NFL Player Retirement Plan ("Board") challenged here, contains separate adverse decisions based upon different plan terms that cause separate harms to Keys:

- 1) The Board denied continuing Inactive A benefits to Keys, the challenge to which involves review of the medical evidence along with interpretation of how disability benefits are classified under the plan. Keys contests the denial of Inactive A benefits in Count II of his Complaint; and
- 2) The Board decided that Keys submitted false information in 2003 when he applied for disability benefits under the plan, thereby entitling the plan administrators to recover \$831,488.28 in benefits paid to Keys over a

thirteen-year period (2003 to 2017), which they have already begun to recover by offsetting the monthly Inactive B benefits awarded Keys. *See* Compl. at ¶¶ 36-47. Keys contests the “overpayment and offset decision,” which involves review of the record and interpretation of the “recovery of certain overpayments” provision within the plan, in Counts I and III of his Complaint.

Accordingly, the Court should allow all three counts of Keys’ Complaint to proceed since they allow Keys to properly challenge the different issues, facts, and plan terms raised by the Board’s final adverse benefit determination.

Background Information Presented in Defendants’ Motion

In their Motion to Dismiss (Doc. 19), Defendants assert that Dr. Chet Janecki concluded in his August 2003 report that all of Keys’ disabilities were the direct result of Keys’ May 7, 2002 motor vehicle accident. *See* Doc. 19 at p. 5. This leaves a false impression of Dr. Jankecki’s medical opinions. The administrative record will show that Dr. Janecki concluded in a September 4, 2003 report that all of the impairments Keys listed in his disability benefit application with the NFL plan were caused by playing in the NFL for seven years. Keys relied upon this information, as well as other medical opinions, when he completed his application for disability benefits on September 13, 2003.

Standard of Review

In reviewing a motion to dismiss for failure to state a claim, the allegations set forth in the plaintiff’s complaint must be accepted as true, construed in the light most favorable to the plaintiff. *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1335 (11th Cir. 2012). The

complaint must have sufficient factual matter accepted as true to state a claim for relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Count I of Keys' Complaint: Request for a Declaration of Rights Under the Plan

As noted by the Defendants, Section 502(a)(1)(B) of ERISA allows a participant such as Keys to “recover benefits due him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.” 29 U.S.C. §1132(a)(1)(B). The Defendants cite *Heffner v. Blue Cross & Blue Shield of Alabama, Inc.*, 443 F.3d 1330, 1338 (11th Cir. 2006), wherein the Eleventh Circuit noted the Supreme Court has recognized there are three distinct remedies available to a plan participant under Section 502(a)(1)(B): ““an action . . . [1] to recover accrued benefits, [2] to obtain a declaratory judgment that she is entitled to benefits under the provisions of the plan contract, and [3] to enjoin the plan administrator from improperly refusing to pay benefits in the future.” *Heffner*, 443 F. 3d at 1338 (quoting *Mass Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985)). See Defendants’ Motion to Dismiss at p. 7.

The remedial statute within ERISA’s detailed scheme, Section 502, has been deemed to provide the exclusive remedies for claimants seeking benefits under an ERISA-regulated plan. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). There is nothing within ERISA, however, which mandates that a claimant may only bring one claim where the claimant has been separately harmed by separate decisions of the fiduciary responsible for overseeing claims administration. Such an approach would be antithetical to the overriding purpose of ERISA of “promoting the interest of the

employees and their beneficiaries in employee benefit plans" and "to protect contractually defined benefits." *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101, 113 (1989) (internal cites omitted).

Count I of Keys' Complaint alleges as follows:

"Keys seeks a declaration that the Board's decision that he owes the Plans due to an overpayment of benefits and that they have a right to offset the monthly disability benefits that would otherwise be paid to Keys in order to reduce that indebtedness was an abuse of discretion since Keys did not provide false information to either the Board or the DICC that led to an award of Plan benefits to which the Plans now contend he was not entitled."

See Compl. at ¶36.

Count I does not address Keys' claim for Inactive A benefits. Rather, it is narrowly tailored to contest the Board's decision that Keys was overpaid \$831,488.28 in benefits over a thirteen-year period and the plan administrator's continuing offset of Keys' Inactive B Benefits in order to collect that sum. *See* Compl. at ¶36.

The Board claims that it has the right to claw-back \$831,488.28 in benefits because Keys submitted false information. *See* Compl. at ¶¶ 36; 39-47. In so claiming, the Board relies upon plan provision 11.12, giving the Board the power to recover certain alleged overpayments (*See* the Board's final adverse benefit determination, Exhibit 2 to the Defendants' Motion to Dismiss, Doc. 19-3). The recovery of overpayments provision states in relevant part as follows:

"If false information submitted causes a player to receive benefits he is not entitled to, then future disability payments will be reduced by the amount of the overpayment."

Plan §11.12. *See* Exhibit 1 to Defendants' Motion to Dismiss, Doc. 19-2, p. 44.

Because Keys did not submit false information in 2003 when he applied for disability benefits, he contests the overpayment and offset decision as an abuse of discretion. To contest this decision, Keys must fit his claim into one of the three prongs of §1132(a)(1)(B). His claim does not fit into the first prong, the right to recover accrued benefits owed, since the benefits at issue have already been paid to Keys over a thirteen-year period. Nor does his claim fit into the third prong: a right to future benefits. Instead, the legal issue arising from the Board's overpayment and offset decision is whether Keys provided false information that led to an award of benefits to which he was not entitled. The best and proper framework for addressing that issue is under the second prong of §1132(a)(1)(b). Keys' claim in Count I is to "enforce his rights under the terms of the plan." More specifically, he seeks to enforce his rights under the plan to retain all of the disability benefits he has received and to prevent the offset of his continuing disability benefits because he did not submit false information which led to an award of benefits to which he was not entitled.

Count I should not be dismissed.

Count III: Equitable Estoppel

With respect to Keys' claim for equitable estoppel in Count III of his Complaint, Defendants assert that ERISA "does not allow a participant to retain overpayments merely because of the passage of time." *See* Defendants' Motion to Dismiss at p. 8. Defendants either misapprehend or misconstrue Count III of Keys' Complaint. Keys is not alleging

estoppel because of the passage of time. Rather, he is alleging estoppel as to the overpayment decision and claw back implemented in 2017 because the plan's claims administrator (the Disability Initial Claims Committee, or DICC) had notice of Keys' car accident in 2004 but was silent about it for thirteen years. *See* Compl. at ¶41.

Defendants have recited the offensive use of estoppel, specifically, the use of equitable estoppel when the "terms of the plan are unclear and a participant seeks to enforce the terms of the plan as they were represented to him." *See* Defendants' Motion to Dismiss at p. 8-9 (citing *Jones v. Am. Gen. Life & Acc. Ins. Co.*, 370 F.3d 1065, 1069 (11th Cir. 2004)). Defendants argue, and Keys acknowledges, that his claim does not satisfy the requirements of a claim of offensive equitable estoppel as described in *Jones*. Like many ERISA cases, *Jones* addresses the circumstances when there are no benefits due by virtue of the plan terms but the claimant has an equitable claim for benefits based upon misrepresentation of the plan by an employer or plan administrator. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), decided by the Supreme Court seven years later, addressed a similar circumstance and opened the door to monetary relief as equitable relief under §1132(a)(3) of ERISA as a result of fiduciary breaches, most commonly a misrepresentation of the plan terms upon which plan participants rely to their detriment.

To be clear, Keys' case is not a misrepresentation of plan terms case. The Board's extraordinary decision that it had a right under the plan to recoup thirteen years of benefits, separate from its decision that Keys is not entitled to Inactive A benefits, places Keys in a defensive posture: he must protect benefits already paid. What Keys asserts in

paragraphs 39 through 47 of his Complaint is defensive equitable estoppel, based upon the claims administrator's thirteen year of silence, which has unquestionably prejudiced Keys.

Equitable estoppel is to be applied flexibly to prevent injustice. *Heckler v. Community Health Services*, 467 U.S. 51, 59 (1984). Although equitable estoppel comes in many forms, its overriding principle is that "where one party has, by his representations or conduct, induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he [cannot], in a court of justice, be permitted to avail himself of that advantage." *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 234 (1959).

Relying upon that principle, Keys asserts that the plan administrators should be estopped from claiming overpayment and offset beginning in 2017 due to Keys' alleged failure to report a minor car accident in 2002 when the DICC, the claims administrator, had notice of the car accident in 2004. By the claims administrator's silence for thirteen years, Keys was severely prejudiced and the Board drew an advantage. Although there are no medical records in the administrative record that will show Keys suffered any lasting impairments from the car accident, had the DICC asked him for more information about the accident during the claims process in 2004, he would have been given the opportunity then, as opposed to 2017 and 2018, to obtain contemporaneous medical evidence to refute any speculation that any of the impairments listed on his 2003 disability application were caused by the car accident instead of playing NFL football for seven years.

The *Glus* decision exemplifies why the common law defense of equitable estoppel should be permitted in this ERISA case. In *Glus*, the issue presented was whether an equitable estoppel defense could be used to defeat a statute of limitations claim made by the respondent, the claimant's employer. *Glus*, 359 U.S. at 231-232. The claim was brought under the Federal Employer's Liability Act (FELA). The claimant alleged that the respondent told him he had seven years to file suit, and that he relied upon that representation in not filing suit within the three years required by FELA. *Id.* The respondent argued there was no authority to permit an equitable tolling of the statute of limitations in a case governed by FELA. *Id.* The Supreme Court found error in the lower court's dismissal of the case on statute of limitations grounds, reasoning as follows to the argument that equitable estoppel was not available to FELA claimants:

"We have been shown nothing in the language or history of the Federal Employer's Liability Act to indicate that this principle of law, older than the country itself, was not to apply in suits arising under that statute."

Glus, 359 U.S. at 234.

This same reasoning applies to the question of whether Keys' claim of equitable estoppel should be permitted in this ERISA case. There is nothing within ERISA which indicates that the law of equitable estoppel may not be applied. As the Supreme Court has made clear, ERISA has a comprehensive civil enforcement scheme that is buttressed by the federal common law. *Pilot Life*, 481 U.S. at 56. Defendants' contention that the only viable form of estoppel in an ERISA case is the offensive use of estoppel as described in the *Jones* case is inconsistent with ERISA's framework, a network of statutes that are

buttressed by the federal common law. Defendant's contention is also inconsistent with the expansive nature of equitable estoppel, which is designed to prevent a party from taking advantage of a situation created by its own conduct.

In this case, Keys should be permitted to proceed with his equitable estoppel claim in his efforts to protect the benefits he has already received.

Conclusion

Defendants' Motion to Dismiss should be denied in all respects. Because the Board's adverse benefit determination contained separate decisions that involve different plan provisions and harmed Keys in multiple ways, Keys should have the right to fully address those separate decisions. He has properly pled his claims in accordance with the framework that ERISA provides and has pled sufficient facts to support those claims.

/s/ Lansing C. Scriven
LANSING C. SCRIVEN, ESQ.
Florida Bar No. 729353
LANSE SCRIVEN LAW
lanse@lansescriven.com
3903 Northdale Blvd., Suite 100e
Tampa, FL 33624
813/940-4000 (Telephone)
813/327-4828 (Facsimile)

--and--

JEFFREY DAHL, ESQ.
Texas State Bar No. 05310900
LAW OFFICE OF JEFFREY E. DAHL
405 N. St. Mary's Street, Suite 242
San Antonio, Texas 78205
210/527-0900 (Telephone)
210/527-0901 (Facsimile)
Attorneys for Plaintiff, Tyrone Keys

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS COUNTS I and II OF DEFENDANTS THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN AND THE NFL PLAYER DISABILITY & NEUROCOGNITIVE BENEFIT PLAN** has been electronically filed with the Clerk of the Court using the CM/ECF system and furnished by E-Mail to **MICHAEL L. JUNK, ESQ.**, mjunk@groom.com Groom Law Group, Chartered, 1701 Pennsylvania Ave., N. W. Washington, D.C., 20006-5811 on this **13th** day of November, 2018.

/s/ *Lansing C. Scriven*